IN THE HIGH COURT OF JUDICATURE OF BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.1488 OF 2005

Vishal Jivan Jogure ... Applicant

versus

Smt.Megha Vishal Jogure and

another ... Respondents

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Mr.D.V. Kedar i/by Mr. G.V. Bhagat, for the Applicant.

Mr.Tejas Deshmukh, for the Respondent No.1.

Mr.A.S. Gadkari, A.P.P., for the Respondent No.2.

...

CORAM : A.M.KHANWILKAR,J.

29th April 2005

P.C.:

. Heard Counsel for the parties. Perused the record. Rule. Mr. Deshmukh waives notice for the Respondent No.1. Mr. Gadkari, A.P.P., waives notice for Respondent No.2. As short question is involved, application is taken up for

final disposal forthwith by consent.

. This application takes exception to the order passed by the Chief Judicial Magistrate, Solapur, dated 23rd February 2005 on application, Exhibit 6 and Exhibit 1, preferred by the Respondent No.1, whereby directed issuance of search warrant for search of the two children, who are in custody of the Applicant, being their father. The application as is originally filed by the Respondent No.1 asserts in the following manner. The Respondent No.1 after marriage was staying along with the Applicant at Mulund and has given birth to two children, Yash on 16th October 1999 and Veerja on 16th November 2001. However, because of the improper behaviour of the Applicant, she had to leave the matrimonial home to secure her safety.

. Insofar as the custody of the two children with the husband, Applicant herein is concerned, the relevant paragraphs are paragraphs 4 and 5 of the application, wherein it is stated as follows. The Respondent No.1 had left the

matrimonial house leaving behind her children in the custody of the Applicant. Children are now in the custody of either the Applicant or accused No.2 or accused No.3, who are maternal uncle and maternal aunt of the Applicant. It is stated that the Respondent No.1 has reason to believe that the children are staying with accused No.2 or accused No.3. Accused No.4 is the mother in law of the Respondent No.1. It is possible that the custody of the children must be with the mother in law.

. In para 5, it is asserted that the Respondent No.1 is the natural guardian of the children. She is worried about the children and she is disturbed on that count. She apprehends that something will happen to her children. On this basis, application under 97 of the Code of Criminal Procedure has been filed before the Chief Judicial Magistrate. The Chief Judicial Magistrate proceeded to pass the impugned order observing that, prima facie, it appears that the children are in wrongful confinement of the Applicant herein, opponent No.1, and the said confinement amounts to an offence. This decision

is subject matter of challenge before this Court at the instance of the Applicant, husband.

. After considering the submissions and going through the record of the case, I find substance in the argument of the Applicant husband that no case whatsoever has been made out in the application as is originally filed by the Respondent No.1 before the Magistrate so as to invoke provisions of section 97 of the Code. Section 97 of the Code is available for search of persons "wrongfully confined" when the Magistrate has reason to believe that any person is confined in such circumstances that the confinement amounts to an offence. In the present case, no allegation, much less even remote suggestion, has been made as to how the custody of the children with the Applicant, who is the husband of the Respondent No.1 and father of the children, can amount to any offence. Nonetheless, in the order impugned before this Court, the Magistrate has prima facie observed that the custody of the children with the Applicant, husband, amounts to an offence. No details as to on what basis that assumption is drawn are reflected in the order

impugned in this Court.

. The question of invoking power under section 97 of the Code, as mentioned earlier, is available only if it is asserted and is established before the Magistrate, prima facie though, that confinement of any person in the circumstances amounts to an offence. By no stretch of imagination, custody of the children with the real father by itself can amount to an offence. Something more has to be alleged and established to support that position. No such allegation is forthcoming in the application, as has been filed. Viewed in this perspective, the Magistrate could not have assumed jurisdiction to issue search warrant in such fact situation, as the basic requirement of section 97 of the Code is not fulfilled. This is not to say that the Respondent No.1, who is the natural guardian of the children, being mother, has no other remedy in law to secure the custody of the said children. We are presently concerned with the question whether search warrants can be issued by the Magistrate merely because the mother complains that she apprehends that something will

happen to the children, who are in custody of their father.

. To get over this position, Counsel for the Respondent No.1 pressed into service decision of the Apex Court in the case of Dr.Mrs. Veena Kapoor v. Varinder Kumar Kapoor, reported in A.I.R. 1982 S.C. 792. The exposition in this decision is in proceedings which were habeas corpus proceedings before the High Court and not one as we are concerned in the present case under section 97 of the Code. The wide powers possessed by the High Court in such proceedings cannot be doubted, but the question is whether the Magistrate can exercise those powers in an application under 97 of the Code. The answer is plainly in the negative. The Magistrate, on the other hand, can exercise power to issue search warrant only in the situation provided for by section 97 of the Code. No more and no less.

. Counsel for the Respondent No.1 then placed reliance on the decision of Allahabad High Court in the case of Zahirul Hussan v. State of Uttar Pradesh, reported in 1988 Cri.L.J. 230.

Indeed, this decision deals with proceedings which were initiated under section 97 of the Code. However, from the finding recorded by the High Court, as can be discerned from para 21, on the facts of that case, is that the confinement of the children amounted to an offence. In the present case, no such finding can be recorded on the basis of allegations made in the application as filed. To record such finding will be travelling beyond the allegations contained in the application filed under section 97 of the Code by the Respondent No.1.

. Accordingly, this application ought to succeed without going into the other issues, which have been raised by the Applicant in the present application. In my view, it is unnecessary to examine those aspects for deciding the point in issue before me.

. Hence, this application succeeds. The impugned order passed by the Chief Judicial Magistrate, Solapur, dated 23rd February 2005 is set aside.

. While parting, it is once again clarified that this decision will not preclude the Respondent No.1 wife to take recourse to such other remedy, as may be permissible by law for securing custody of the children from the Applicant, who is her husband. Those proceedings will have to be decided on its own merits in accordance with law. All questions in that behalf are left open.

(A.M.KHANWILKAR,J.)